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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 72877

CARL KEISTER AND HOWARD G. WILLAMON, *Petitioners,*

v.

SAN DIEGO AND ARIZONA EASTERN RAILROAD COMPANY
a corporation, *Respondent.*

OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent, San Diego and Arizona Eastern Railway Company, respectfully requests that this Court deny the Petitions for Writs of Certiorari to review the judgment and opinion of the United States Court of Appeals of the Ninth Circuit entered in these proceedings on July 5, 1977.

OPINIONS BELOW

The opinions are adequately set forth in the Petition, except that Respondent attaches the Order Consolidating Cases for Argument and Submission dated October 21, 1975 by the Ninth Circuit as Appendix A.

JURISDICTION

The jurisdictional requisites are set forth in the Petition. Respondent, however, opposes a consolidated Petition for Certiorari on the basis that there is no jurisdiction for a consolidated Petition. The Order Consolidating the Cases below was for argument and submission only, and did not consolidate the cases for briefing. [Appendix A.] Respondent submits that each party plaintiff should separately Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the Federal Employer's Liability Act, 45 U.S.C. 351 *et seq.* (hereinafter "FELA"), applies to railroad employees who sustained injuries in foreign countries while in the service of their United States employer?

STATEMENT OF FACTS

Petitioner Keister was injured August 3, 1973, in Mexico by allegedly defective Mexican equipment while he was employed by Respondent on a train destined for a location in Mexico.

Petitioner Howard G. Willamon was injured February 10, 1973, while riding the Respondent's train in Mexico, when a metal object propelled by an unidentified third person outside of the train struck his right eye.

As a result of the foregoing, Petitioners Keister and Willamon filed lawsuits against the Respondent railroad, invoking Federal jurisdiction on the basis that the FELA was applicable.

REASONS FOR DENYING THE WRITS

1. There Is No Conflict With The Decisions Of This Court.

The United States Supreme Court has consistently held that the FELA is not applicable to a United States citizen who

has sustained injuries in a foreign country while in service of his United States employer. The leading case denying extraterritorial application of the FELA is *New York Central Railroad Co.* v. *Chisholm,* 268 U.S. 29 (1925). Petitioner attempts to construct a conflict between decisions of this Court, but examination of those cited decisions reveals that there is no conflict. Rather, the Court has consistently maintained for three-quarters of a century that the FELA has no extraterritorial application.

As in the instant case, the *Chisholm* case involved injuries to a United States citizen-employee while employed on a train operated by a United States employer. The injury in the *Chisholm* case was suffered at a point just north of the United States-Canadian border on the New York Central Railroad Company's run between Malone, New York and Montreal, Canada. In the process of construing the FELA, the Supreme Court noted that the FELA statute:

> "Contains no words which definitely disclose an intention to give it extraterritorial effect, nor do the circumstances require an inference of such purpose." 268 U.S. at 31.

Petitioners have suggested that a 1939 amendment to the Act broadened the scope of the Act. However, thirteen years after this 1939 amendment, the United States Supreme Court reaffirmed its long standing decision that the FELA should not be applied to United States citizens who may sustain injuries abroad while in service of their United States employers. In *Lauritzen* v. *Larsen,* 345 U.S. 571 (1952), the Court reaffirmed the *Chisholm* ruling that the FELA has no extraterritorial application.

In their effort to attempt to create a conflict, Petitioners cite *Reed* v. *Pennsylvania Railroad Co.,* 351 U.S. 502 (1955), for the proposition that a class may not be excluded from benefits

of the FELA. The court in that case held that a clerical employee of the railroad was entitled to coverage under the FELA. Petitioners have attempted to create a class consisting of "employees whose duties carry them into foreign countries." [Petition, page 6.] There is no class exclusion. Any employee of a railroad injured within the United States is entitled to the benefits of the Act. On the other hand, any employee (including a clerical employee) injured outside of the United States is not covered under the Act. *Reed* v. *Pennsylvania Railroad Co.* did not address the question of extraterritorial application of FELA. To the contrary, this Court's decision in *Chisholm* has been later reaffirmed in *Lauritzen* v. *Larsen,* in which the Court found no reason to depart from *Chisholm's* clear and long-standing construction regarding the extraterritorial nonapplication of the FELA.

2. There Is No Conflict Between Decisions of the Circuits.

The present decisi[on] is fully in accord with the only other decision by a Co[urt] of Appeal in which the same issue has been squarely presented. *Cox* v. *Chesapeake Ohio Railroad Co.,* 494 F.2d 349 (6th Cir. 1974), *cert. den.* 417 U.S. 977 (1975). In *Cox,* the plaintiff, while employed by the Chesapeake Ohio Railroad Company, a United States employer, was transported across the border to Duton, Canada, in order to perform services. While he was performing those services under the direct supervision and control of the railroad's officers and while performing said services with equipment furnished, permanently located, and serviced by the railroad from its facilities located in Detroit Michigan, Cox sustained serious personal injuries, allegedly as a result of the railroad's failure to provide proper equipment.

Cox alleged the negligent acts occurred within the United States. The Sixth Circuit in *Cox* stated:

> "*Chisholm* remains a firm restriction on the extraterritorial application of FELA. Indeed, the Supreme Court apparently added to this resolve in *Lauritzen* v. *Larsen* wherein it stated that 'we have held FELA not applicable to an American citizen's injuries sustained in Canada while in service of an American employer.' " 494 F.2d at 350.

The only circuits that have considered the question (i.e., the Sixth and the Ninth) have unanimously upheld this Court's ruling in *Chisholm* that FELA does not apply extraterritorially.

3. The *Chisholm* Decision Is Not Ambiguous.

Petitioners seek to distinguish *Chisholm* on the grounds that the complaints allege acts of negligence occurring within the United States. In *Lauritzen* v. *Larsen,* the court focused on the place of injury by stating:

> "The Federal Employer's Liability Act [is] not applicable to an *American citizen's injury sustained in Canada* while in service of an American employer. *New York Central Railroad Co.* v. *Chisholm,* 268 U.S. 29." (Emphasis added.) 345 U.S. at 579.

If *Chisholm* were read as Petitioners suggest, the ruling of *Chisholm* would be severely undermined in that a pleader could always allege that some act of negligence occurred within the territorial limits of the United States. Petitioner Keister's injury resulted from an alleged defect in a switch permanently located in the Republic of Mexico and owned, not by the railroad, but by the Tijuana and Tecate Railway Company, a Mexican corpora-

tion. Petitioner Willamon's injury was inflicted by an unknown third party while Willamon was "on the Mexican side of the border while riding in the cab of the locomotive" according to Petitioner's statement of the facts. [Petition, page 3.] There is no ambiguity in applying *Chisholm* to the facts of the present case.

4. There Is No Issue Warranting Review on Certiorari.

Petitioners do not contend that there is any important question of constitutional law requiring review by this Court. Further, there is no important public policy requiring such review. The FELA was first enacted in 1908, before enactment by the majority of states of worker's compensation laws. The purpose of the FELA was to modify the common law master-servant relationship and to place on railroads the cost of injuries suffered by their employees, since such injuries were deemed to be part of the costs of doing business. At present, however, railroad employees are among the very few employees still authorized to sue their employers. The vast majority of employees have remedies for injuries suffered in the course of their employment under the various state worker's compensation laws. Under worker's compensation laws, employees receive the benefit of no-fault coverage. In California, Labor Code Sections 3600.5 and 5305 clearly provide for extraterritorial effect of the worker's compensation laws. Moreover, Petitioners have been unable to identify any border state that prohibits the extraterritorial application of a worker's compensation scheme of recovery.

The policy of encouraging safety by employers is promoted by the comprehensive approach of worker's compensation. The employer is strictly liable for injuries. As early as 1919, the California Supreme Court held in *Terminal Railways* v. *I.A.C.*, 180 Cal. 121, 179 P. 386 (1919), that worker's compensation applies to the extent not excluded by FELA. Since FELA does not apply extraterritorially, worker's compensation is available, and provides an incentive for an employer to prevent injuries occurring in the course and scope of any employment, whether within the United States or extraterritorially. Because worker's compensation applies to the extent that it is not excluded by FELA, there is no assumption of the risk defense available as suggested by Petitioners. Petitioners are given a different means of recovery. Petitioners have not been able to show a substantial question warranting this Court's review of the decisions by the District Court and Court of Appeals for the Ninth Circuit.

5. This Identical Issue Was Recently Denied Review by Petition for Certiorari.

In 1974, the Sixth Circuit in *Cox* recognized the continued vitality of the *Chisholm* rule restricting extraterritorial application of the FELA. This Court denied Certiorari in that case. *Cox* v. *Chesapeake Ohio Railroad Co.*, 494 F.2d 349 (6th Cir. 1974), *cert. den.* 417 U.S. 977 (1975).

CONCLUSION

No amount of rhetoric can transform the facts of these cases into a case justifying Supreme Court review. The precise issue of the extraterritorial application of the FELA was definitely determined by the Supreme Court over three-quarters of a century ago by *Chisholm*, and has been reaffirmed by the Supreme Court as recently as 1952 in *Lauritzen*. The decisions below are not in conflict with any decisions of this Court or with the decisions of other circuits. Manifestly, there is no important question of constitutional law or public policy requiring review by this Court. Therefore, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 21 1975

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

CARL KEISTER, Plaintiff-Appellant, vs. SAN DIEGO AND ARIZONA EASTERN RAILROAD, a corporation, Defendant-Appellee.	No. 75-2431
HOWARD G. WILLIAMON, Plaintiff-Appellee, vs. SAN DIEGO AND ARIZONA EASTERN RAILROAD, a corporation, Defendant-Appellant.	No. 75-2495

ORDER VACATING ORDER AND CONSOLIDATING CASES FOR ARGUMENT AND SUBMISSION AND SETTING TIMES FOR FILING BRIEFS

In light of the opposition filed by San Diego and Arizona Eastern Railroad, and good cause appearing therefor,

IT IS ORDERED that the order filed on October 17, 1975, is vacated, and

IT IS FURTHER ORDERED that the above-captioned appeals be consolidated for purposes of argument and submission, and

IT IS FURTHER ORDERED that appellant Keister in No. 75-2431 and appellant San Diego and Arizona Eastern Railroad in No. 75-2495, shall serve and file their opening briefs on or before December 1, 1975; appellees in each case shall serve and file their briefs on or before January 12, 1976; and appellants shall serve and file their reply briefs on or before January 30, 1976.

DATED: October 21st, 1975.

United States Circuit Judge